SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted]
214

WESTERN LAUNDRY AND LINEN RENTAL CO. and MORRIS A. HAZAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

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WESTERN LAUNDRY AND LINEN RENTAL CO. and MORRIS A. HAZAN,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Western Laundry and Linen Rental Co., a partnership, and Morris A. Hazan, an individual, one of the partners, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment and sentence of the United States District Court for the Central District of California.

OPINION BELOW

The opinion of the Court of Appeals was entered on March 30, 1970 and is not yet reported. A copy of the opinion is hereto annexed as Appendix "A."

GROUNDS OF JURISDICTION OF THIS COURT

A petition for rehearing was not filed in this matter following entry of the aforesaid judgment.

An extension of time in which to file this petition for certiorari was granted by this Court until May 29, 1970.

The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question are: Title 28, U.S.C., 1254(1); Title 18, U.S.C., Rule 37(c), Rules of Criminal Procedure, and Rule 2(3) of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. **Does the United States Constitutional proscription against double jeopardy and double punishment require that sentence against petitioner Hazan be eliminated?**

2. **Must the sentence against Western Laundry and Linen Rental Co. (hereinafter referred to by the name Western), a partnership of petitioner Hazan and a corporation (Delmar), be eliminated by reason of the non-prosecutability of a partnership under the Sherman Act?**

3. **Was the defense of petitioners that there was either double jeopardy or double punishment by the imposition of fines on both Hazan and Western waived by**

their respective pleas of *nolo contendere*?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The **Fifth Amendment of the United States Constitution** provides in part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; . . . ."

2. **Title 15, U.S.C., section 1**, under which petitioners were prosecuted and sentenced—commonly referred to as the "Sherman Act"—provides in part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, or commerce among the several States, or with foreign nations, is declared to be illegal; . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor . . ."

and thereafter sets forth that on conviction thereof, fine or imprisonment not exceeding one year, or both said punishments, shall be imposed in the discretion of the court.

3. **Title 15, U.S.C., section 7**, provides:

> "The word 'person' or 'persons,' whenever used in sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign

country.

4. **Title 15, U.S.C., section 12 (Sherman Act)** defines the words "person" and "persons" in the identical language of section 7 of Title 15, U.S.C., *supra*.

5. **Title 1, U.S.C., section 1** provides in part:

> "In determining the meaning of any Act or resolution of Congress . . . the word 'person' *may* extend and apply to partnerships and corporations . . . unless the context shows that such words were intended to be used in a more restricted sense."

6. **Title 18, U.S.C., Rule 12(a), Rules of Criminal Procedure**, provides in part:

> "Pleadings in criminal proceedings shall be the indictment and information and the pleas of guilty, not guilty and *nolo contendere*."

STATEMENT OF THE CASE

Defendant-petitioner Western is a joint venture composed of defendant-petitioner Hazan and a corporation (Delmar) [Tr. p. 097, Affidavit of Harold Easton] and was so indicted, *viz.*, as "a partnership existing under the laws of the State of Nevada" [Tr. p. 003].

Defendant-petitioner Hazan at all times relevant hereto was a joint venturer in said Western [Tr. p. 097, Affidavit of Harold Easton] and was named in the indictment as "partner" in "Western Laundry and Linen Rental Co." [Tr. p. 004].

The indictment, filed April 30, 1968, charged these and other defendants (corporations and individuals) with

violation of section 1, Title 15, U.S.C. (Sherman Act) in a single count, for conspiracy, within the five-year period preceding the return of the indictment [Tr. pp. 2-8].

The jurisdiction over the case was conferred on the United States District Court, Central District of California, by section 41 of Title 15, U.S.C.

On June 7, 1968, defendant Hazan executed and filed a written authorization for his counsel to tender a plea of *nolo contendere*, and requested that the personal appearance of Hazan be not required:

> "The reason for said request is a history of heart illness of the undersigned and the advice of his doctors to minimize stress. This request is made due to health reasons and no other." [Tr. p. 037.]

Pleas of *nolo contendere* were made by these defendants and they were convicted thereon. Said defendants separately were each sentenced as follows:

Western Laundry and Linen Rental Co. to pay $25,000 as fine; and

Morris A. Hazan to pay $1,000 as fine

to the United States of America [Tr. pp. 061, 052, 058]. By stipulation and order, the payment of fines was stayed until final determination on the motions [Tr. pp. 092, 093] that were thereafter made.

These defendants, on September 17, 1968, moved the court to reduce and to eliminate sentences on grounds that the sentence against defendant Hazan constituted double punishment and was a denial of due process of law and that the interests of justice favored elimination of his sentence and a reduction of the sentence of Western [Tr. pp. 063,

064]. Among the documents filed in support of the motion was a statement of Dr. Cavel, showing that Mr. Hazan was suffering from coronary disease [see Tr. p. 077], setting forth that,

> "It is the considered judgment of the undersigned [Dr. Cavel] that any court appearance with its attendant stresses would be significantly prejudicial to Mr. Hazan's future health and well being."

The points raised by these defendants included, among others, the following, relevant to this petition:

> The proscription against double prosecution and double punishment requires that defendant Hazan's sentence be eliminated. Prosecuted both as an individual and as a partner, defendant Hazan was twice sentenced for the same offense, and doubly to be punished [Tr. pp. 066-086].

The motion was denied, and [Tr. p. 084] motion for reconsideration was filed September 30, 1968. Further briefs were filed by defendants and by plaintiff, and on November 15, 1968, it was ordered, after hearing, that plaintiff file a supplemental brief, that defendants were to file their reply thereafter, and that defendants' motion for reconsideration of motion to eliminate and reduce sentence would then stand submitted [Tr. p. 118].

At the time of hearing, defendants raised the further point that the government did not possess the power to indict a partnership or joint venture for Sherman Act violations and orally moved to dismiss and eliminate sentence as to Western on that further ground [see Tr. p. 170]. The court ordered the government to file its brief on the

issue and gave defendants the opportunity to reply. The government filed its brief thereon [Tr. pp. 170-184] and on the double jeopardy issue. Defendants responded [Tr. pp. 206-213], summarizing their oral argument and replying to the government memorandum.

The grounds of the motion were, in summary, double jeopardy, double punishment, and the impropriety of prosecuting or assessing punishment against a partnership under the antitrust laws [Tr. pp. 206 *et seq.*]. Defendants' motions were denied [Tr. p. 221] and Notice of Appeal filed [Tr. p. 222].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME

I

The Imposition Of Punishment Upon Both Petitioner Hazan And Petitioner Western Laundry And Linen Rental Co., A Partnership Of Which Hazan Was One Of The Partners, Constituted Double Jeopardy Or Double Punishment, Which Is Proscribed By The Fifth Amendment Of The United States Constitution.

Morris A. Hazan challenges the right and power of the government and the court to convict and punish him doubly, first as a partner and next as an individual; the single count indictment names and charges "Western Laundry and Linen Rental Co., a partnership" and Morris A. Hazan "associated with the company" [Tr. p. 003], thereby necessarily prosecuting and seeking to convict Mr. Hazan doubly, *i.e.*, twice

in relation to his association as a partner.*

The government was aware of Western's non-corporate nature, having indicted Western as a partnership and thereafter being notified, by the affidavit of Harold Easton, Esq. [Tr. pp. 097-098] that Western began as a joint venture of Delmar Corporation, Morris A. Hazan, and Clyde Cratchfield, with 81% of the venture owned by Delmar, 17% by Mr. Hazan, and 2% by Mr. Cratchfield from April 1, 1961 to May 24, 1963.

The Easton affidavit further showed that, from May 24, 1963 forward, the venturers were Delmar (with 81%) and Mr. Hazan (with 19%). Thus, the joint venture of 1961-1963 and the joint venture of 1963-to-date were successively operating during the five-year period referred to in the indictment, *viz.* from April 1963 to April 1968.

Thus, it is clear that the government was fully notified that Western was not an entity, that Western included Mr. Hazan, and (by the Easton affidavit filed October 11, 1968) that another individual venturer was being reached and that successive joint venturers came under the name "Western."

These facts are central to both issues, *viz.*, the double jeopardy of Mr. Hazan and the prosecutability and assessability of joint-venture Western.

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*The relevant wording of the indictment is:

2. Western Laundry & Linen Rental Co., a partnership existing under the laws of the State of Nevada, is hereby indicted and made a defendant herein. Western Laundry & Linen Rental Co. has its principal place of business in Las Vegas, Nevada and has within the period covered by this indictment been engaged in the linen supply business in the Las Vegas area.

3. Each of the individuals listed below is hereby indicted and made a defendant herein. During all or part of the period covered by this indictment, each has been associated with the company or companies indicated below in the position indicated below:

NAME	COMPANY	POSITION
Morris A. Hazan	Western Laundry & Linen Rental Co.	Partner

As *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873), emphasizes, there is little question that the framers of the Constitution were most concerned with multiple punishments. Madison's first proposal for the double jeopardy proscription demonstrated this concern:

> "No person shall be subject . . . to more than one punishment or one trial for the same offense."

1 *Annals of Congress* (1789-91) 433 (1834).

Recently the Ninth Circuit Court of Appeals held that:

> "A second punishment for the same offense violates the double jeopardy provision of the fifth amendment."

Johnson v. Rhay (9 Cir.) 266 F.2d 530,533. *Smith v. United States*, 287 F.2d 270, 274 (9 Cir.), *cert. denied* 366 U.S. 946 (1961). See also, comment, *Double Jeopardy*, 75 Yale L.S. 262 (1965).

In *United States v. Linen Service Council of New Jersey*, 141 Fed.Supp. 511 (D.C.N.J. 1956), in opinion by District Judge Meaney, an anspect (self-incrimination) of the Fifth Amendment was considered in relation to prosecution under the antitrust law of a partnership. There, *subpoena duces tecum* was to the defendant partnership. The question determined was whether immunity attached to the individual partner as a result thereof, even in a "Uniform Partnership State," such as New Jersey. Said the court:

> ". . . An analysis shows that there have been three different conclusions in the courts of the United States as to whether partners have a personality separate and distinct from the partnership for the purpose herein under consideration. One gives a definite 'No' and says that the privilege is

available to a partner as to partnership records, for they are personal records. *United States v. Lawn* (D.C.S.D.N.Y. 1953) 115 Fed.Supp. 674; *United States v. Brasley* (D.C.W.D.Pa. 1920) 268 Fed. 59. One is equivocal, holding that where the only purpose is to conduct the personal business of the partners there is no distinctness, while large, impersonal partnerships may take on their own personality. *United States v. Onassis* (D.C.D.C. 1954) 125 Fed.Supp. 190; *In re Subpoena Duces Tecum* (D.C.N.D.Cal. 1948) 81 Fed.Supp. 418. Finally, the third sets forth an unequivocal 'Yes,' distinguishing or candidly disagreeing with the cases cited above. *United States v. Onassis* (D.C. S.D.N.Y. 1955) 133 Fed.Supp. 327.

"Significant to this court is a well-considered dictum by Chief Judge Biggs in his dissenting opinion in *United States v. White* (3 Cir. 1943) 137 F.2d 24, the majority opinion of which was reversed by the United States Supreme Court in *United States v. White, supra.* The learned Judge said at pages 27, 28:

> 'A member of a partnership may maintain the privilege against self-incrimination in respect to the production of the records of the partnership. The right to choose one's fellow members, the *delectus personarum,* which is regarded as one of the most important and indispensable characteristics of a partnership, is not available to the members of a labor union. * * * Unlike the members

> of a partnership, the members of a union do not act as agents for each other or assume responsibility for the conduct of the other members. * * * '
>
> "It is also important to note that a partnership, unlike a labor union, is not perpetual as is a corporation. It is for instance dependent on the life of every member. R.S. 42:1-31, subd. N.J.S.A.
>
> "This court agrees with Judge Biggs and notes *Boyd v. United States* (1886) 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, where the Court without discussion assumed that documents of a partnership were private papers of a defendant partner (although this case was probably decided before the promulgation of the Uniform Partnership Law) "

Not only the rule against self-incrimination, but also the rule against double jeopardy within the Fifth Amendment, prevents prosecution of the individual partner where, in the one circumstance, the partnership has been subjected to *subpoena duces tecum*, as in *Linen Service Council,* and in the other circumstance, namely, here. See *United States v. American Honda Motor Co.*, 21 Fed.Supp. 979, 987 (U.S.D.C. Cal.). Indictment, prosecution and penalty imposed upon the partnership constitutes a bar to concurrent and double indictment, prosecution and punishment of one of the persons of that partnership.

II

The Trial Court Lacked Jurisdiction To Accept A *Nolo Contendere* Plea Of Western And Impose A Punishment On It, Because Partnerships In Themselves As Entities Are Not Subject To Prosecution Under The Sherman Act.

The Sherman Act, sections 7 and 12 of Title 15, U.S.C., defines "persons" as including "corporations and associations." No mention is made of "persons" as including "partnerships" or "co-partnerships," as provided in other acts referred to in the case of *United States v. A & P Trucking Co.*, 358 U.S. 121, 3 L.Ed.2d 165.

In the *A & P Trucking Co.* case, the issue was raised as to whether a partnership could be prosecuted under the Motor Carrier Act, and the Supreme Court held that it could, because of the express wording of the Act. On page 123, the Court calls attention to the fact that the Act defines "person" as meaning "any individual, firm, *co-partnership,* corporation, company, association or joint-stock association." In note 3, the Court states that Congress has specifically included partnerships in a large number of regulatory acts, showing its intention to treat partnerships as entities (various acts mentioned). The Court stated on page 124:

> "True, the common law made a distinction between a corporation and a partnership, deeming the latter not a separate entity for purposes of suit. But the power of Congress to change the common law rule is not to be doubted. [Citing *United States v. Adams Express Co.*, 229 U.S. 381.) We think it beyond

> dispute that it has done so in § 322(a), for, as we have seen, 'person' in that section is *expressly defined in the Motor Carrier Act to include partnerships.*" (Emphasis added.)

The Court referred to the Rules of Construction, Title 1, U.S.C., section 1, that "persons" included partnerships and corporations "unless the context shows that such words were intended to be used in a more limited sense." The Court noted that the Act involved therein *expressly* included partnerships in the definition of "persons."

The situation in the instant case is exactly the opposite. Here, there is a complete omission of the word "partnerships" as coming within the definition of the word "persons." If Congress had wanted or intended to include partnerships within the definition of "persons," it would have so provided in the Sherman Act as it did in the Motor Carrier Act, the Interstate Commerce Act, the Agriculture Marketing Act, and other regulatory acts mentioned in note 3 of the *A & P Trucking Co.* case referred to above. The omission thereof comes within the well-recognized axiom "*expressio unius est exclusio alterius*" and clearly precludes prosecution of partnerships under the Act.

A separate opinion by Mr. Justice Douglas, with whom Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Whittaker concurred, in *A & P Trucking*, states that it is improper, in the absence of express inclusion of "partnership," for a partnership to be prosecuted:

> "18 USC § 835, unlike the Motor Carrier Act, has not explicitly subjected partnerships to criminal liability, and I do not think that such liability should be implied, for we are dealing with a penal

statute which should be narrowly construed.

"As Chief Justice Marshall wrote in *United States v. Wiltberger* (US) 5 Wheat 76, 95, 5 L.Ed. 37, 46, 'The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'

"With that approach we would not allow this criminal sanction to attach under 18 USC §835. A corporation is an artificial, legally created entity that can have no 'knowledge' itself and is said to have 'knowledge' only through its employees. On the other hand a partnership means A, B and C—the individuals who compose it. In this country the entity theory has not in general been extended to the partnership.

"Judge . . . Hand summarized the history in *Helvering v. Smith* (CA2d) 90 F.2d 590-592. If Dean Ames had had his way, the mercantile or entity theory of the partnership would have prevailed. But those who took up the drafting of the Uniform Partnership Act after his death adhered to the common law attitude *[358 US 128] toward a partnership—that *it is an aggregation of individuals. That is to say, the Act adopted the aggregate rather than the entity theory. And that Act is in force in about three-fourths of the States. One who combs the reports today can find cases espous-

ing the entity theory. But they are in the minority and consciously reject the other theory. As Professor Williston has shown, the main stream of American partnership law follows the British course of treating the partnership in the pluralistic sense. The Uniform Partnership Act, 63 U.of Pa.L.Rev. 196, 208. We should therefore assume that this criminal statute, written against that background, reflects the conventional aggregate, not the exceptional entity, theory of the partnership.

"We are dealing with a statute where liability depends on 'culpable intent,' as stated in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342, 96 L.Ed. 367, 372, 72 S.Ct. 329. The partners could not be held criminally responsible for the acts of their employees. *Gordon v. United States*, 347 U.S. 909, 96 L.Ed. 1067, 74 S.Ct. 473. The partnership, being no more than the aggregate of the partners, should stand on the same footing, *unless Congress explicitly provides otherwise.* Title 1 USC § 1 defines 'person' in any Act of Congress to include a partnership, 'unless the context indicates otherwise.' The context of 18 USC § 835 does indicate otherwise for the Act punishes only those who knowingly violate it. The aggregate theory of partnership law teaches that there can be no vicarious criminal liability where no partner is culpable.'

"If the rule of strict construction of a criminal statute is to obtain, 18 USC § 835 must be read narrowly to reflect the prevailing view of partnership law.

> If the entity theory is to be applied for the purpose of imposing criminal penalties on partnership assets, where the partners are wholly innocent of any wrongful act, it should be done only on the *unequivocal* command of Congress, *as is the case under the Motor Carrier Act*." (3 L.Ed.2d 171; emphasis added.)

Thus, the concurrence in *A & P Trucking* by the four Justices named emphasizes that without express specification in the definition of "person," the partnership cannot be prosecuted. There being no express specification (note that other forms of business are specified) in the antitrust statute (quoted *supra*), it follows that Western is not prosecutable at all, even apart from the double jeopardy question.

As the affidavit of Mr. Easton shows, Western was not even a partnership but, merely, a joint venture. Antitrust views the joint venture as an aggregation, so that the joint venturers conspire with each other. In *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593, the Court held that the defendants could not hide behind the joint venture as a means of disavowing that their joinder constituted a combination. The entity concept was again rejected.

Western was organized under the Uniform Partnership Act, which is part of the laws of Nevada. Under said Act, a partnership is an aggregation of individuals not an entity. This circumstance, combined with the fact that the Sherman Act does not extend the definition of "persons" to include "partnerships" as do other regulatory acts, definitely indicates that partnerships were not intended to be included as subject to prosecution as entities, but that only individual partners are subject to prosecution under the Act.

III

The Defense Of Petitioners That There Was Double Jeopardy or Double Punishment By The Imposition Of Fines On Both Hazan And Western Was Not Waived By Their Respective Pleas Of *Nolo Contendere.*

Judge Madden, in this case, in the Court of Appeals, stated in his opinion, concurred in by Judge Ely, that there was a clear distinction in the Sherman Act between the interest of a partner in a partnership and a stockholder in a corporation, and that if Hazan is required to pay the fine of Western, "a problem of double jeopardy is presented" (Appendix "A" p. 5; quoting from *Green v. United States,* 355 U.S. 184, 198). He stated further:

> "If the constitutional proscription of double-jeopardy is otherwise violated we think that the fact that one of the punishments is contingent upon some other event such as, in our instant case, the failure of Western to pay the fine levied against it, does not eliminate the vice of double jeopardy." (Appendix "A" p. 6.)

However, he based his decision affirming the lower court's rulings on the basis that Western was a distinct entity and, hence, there was no double jeopardy. Judge Ely agreed with Judge Madden on this point. Judge Hufstedler, in concurring, based her decision on the ground that there was a waiver of the defense of double jeopardy or double punishment by the pleas of *nolo contendere* and defendants could not raise such issue on appeal. Judge Ely agreed with this.

In *Lott v. United States,* 367 U.S. 42 (1960), the

defendants pleaded *nolo contendere* to a charge of income tax evasion. Judgment was not pronounced until three months later. The day after the judgment was entered the petitioners filed motions in arrest of judgment; and upon denial thereof 20 days later, petitioners appealed. The appeal was dismissed by the Court of Appeals as untimely; but the Supreme Court reversed, holding "that it was the judgment of conviction and sentence, not the tender of pleas of *nolo contendere*, that constituted the determination of guilt within the meaning of Rule 34." The Court held that while the plea means literally "I do not contest it," and it does admit "every essential element of the offense [that is] well pleaded in the charge," nevertheless, "It [the plea] does not dispose of the case. It is still up to the court to render 'judgment' thereon."

In the case of *United States v. American Radiator etc. Corp.*, 288 Fed.Supp. 696 (Aug. 19, 1968), the court, in discussing the difference between pleas of "guilty" and "*nolo contendere*," stated on page 700:

> "However, there is a difference between the pleas. A plea of guilty once accepted is tantamount to a conviction. . . . But a plea of *nolo contendere*, even though accepted, is only an admission of guilt on the facts of the case as set forth in the indictment for the purpose of the case. [Citing: *Lott v. United States, supra; Bell v. Comr. of Internal Revenue,* 320 F.2d 953; *Mickler v. Fahs,* 243 F.2d 515.]
>
> "While in *Hudson v. United States,* 272 U.S. 451, . . . , the Supreme Court has held that a plea of *nolo contendere* is a declaration by the accused

> that he will not contest the charge against him, and that he pleads guilty for the purpose of this case, it is, nevertheless, not a final decree and is subject to attack even after sentence as in the case of a conviction. [Citing: *Lott, supra,* and *United States v. Frankfort Distilleries,* 324 U.S. 293.]"

The rule is stated in 22 Corpus Juris Secundum 1208 that said plea waives all defenses *other than that the indictment charges no offense.*

In the instant case, the objection raised by petitioners is more properly that of double punishment rather than the usual double jeopardy objection. The latter is a defense which is pleadable under Rule 12(a) of the Rules of Criminal Procedure, where the defendant has prior to the current proceedings been charged, acquitted or convicted in the earlier proceedings. In this case there were no prior proceedings for which the defense of double jeopardy might presently attach. It is the double punishment imposed herein that is objected to, and this could not take place earlier than the rendition of judgment and sentences were rendered on the respective pleas.

In the case of *United States v. Goldman,* 352 F.2d 263, the court stated on page 266:

> "Protection against double jeopardy has two distinct aspects. It serves as a safeguard against unfair double punishment and it also protects the accused from unfair harassment of successive trials. [Citing *Ex parte Lange, supra.*] We have already pointed out that to sustain the present sentence is not to sanction double punishment. Moreover, there is no issue of successive trials here such as charac-

terizes many controversies over double jeopardy."

If we apply *Goldman* to the instant case, it is apparent that the issue of double jeopardy arose. The government could have indicted either Western or Hazan and could have proceeded against the one or the other so indicted. It chose to indict both of them; but until judgment was actually rendered, there was still the possibility of election. We submit that only at the time of the rendition of judgment was the government required to elect and determine which of the two it wished to have held for the alleged conspiracy, and that it could not hold both of them therefor. Thus, the issue of double jeopardy arose for the first time at that point, and, hence, any plea of double jeopardy could not be made until that part of the proceedings was reached.

It is further contended herein that the defense of *nolo contendere* did not admit that the indictment charged an offense against the partnership. If the partnership is not chargeable for violation of the Sherman Act, then the plea of *nolo contendere* did not preclude objection on appeal of the invalidity of the indictment, and, hence, the plea was not a waiver of such objection. The objection that the indictment failed to charge an offense survives the plea of *nolo contendere*. *Crolich v. United States*, 196 F.2d 879; *United States v. Bradford*, 160 F.2d 729.

In the case of *DePugh v. United States*, 393 F.2d 367, the defendant pleaded *nolo contendere*. The court stated on page 368:

> "This court is not foreclosed by a plea of *nolo contendere* from considering the sufficiency of the indictment."

CONCLUSION

In conclusion, we respectfully request this Honorable Court to grant certiorari for the reasons above stated and for the further following reasons; namely, (a) that the issues presented herein involve important questions of law pertaining to the Sherman Act, which have not been and should be settled by this Court, and (b) that a decision by this Court is necessary for the guidance of lower courts, both federal and state, throughout the United States.

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

WESTERN LAUNDRY AND LINEN RENTAL CO., and MORRIS A. HAZAN, Appellants, vs. UNITED STATES OF AMERICA, Appellee.

No. 24,280

[March 30, 1970]

On Appeal from the United States District Court for the District of Nevada.

Before: MADDEN*, Judge of the United States Court of Claims; ELY and HUFSTEDLER, Circuit Judges.

MADDEN, Judge:

In April 1968, an indictment charging five corporations, one partnership, which was Western Laundry and Linen Rental Co., (Western) one of the appellants herein, and five individuals, one of whom was Hazan, the other appellant herein, was filed in the United States District Court for the District of Nevada. The indictment charged violation of Section 1 of the Sherman Anti-Trust Act. 15 U.S.C., Section 1. The indictment charged a conspiracy to raise, stabilize and maintain prices of linen supplies in the Las Vegas, Nevada area; to refrain from soliciting one another's customers; and to allocate business.

On July 24, 1968, all of the defendants were convicted

*Senior Judge, United States Court of Claims, sitting by designation.

upon pleas of *nolo contendere*. Each defendant was sentenced to pay a fine. The fines varied from a minimum of $1,000.00 to a maximum of $35,000.00. Western was fined $25,000.00. Hazan was fined $1,000.00. No sentence of imprisonment was imposed upon any of the defendants.

On September 17, 1968, the defendants Western and Hazan, hereinafter designated as the defendants, filed, in the District Court, a "Motion to Eliminate and to Reduce Sentences". That motion was based primarily upon the argument that the indictment of both Hazan, an individual, and Western, a partnership in which Hazan was a partner, put Hazan in double jeopardy and subjected him to two sentences. That motion also raised other issues not involved in the instant appeal. The motion was denied on September 26, 1968.

A motion for reconsideration was filed on September 30, 1968. Memoranda were submitted by Western and Hazan, and by the United States. A hearing was held on November 15, 1968. The alleged double jeopardy of Hazan was again argued in this hearing, and, in addition the defendants presented, for the first time, the contention that a partnership is not subject to prosecution under the Sherman Act. The Court ordered the parties to submit supplemental briefs on this newly raised question. The Court, on January 27, 1969, denied the defendant's motion for reconsideration. Thereafter the defendants timely filed the instant appeal.

We consider first the question whether a partnership is subject to indictment for violation of the Sherman Act. Section 3 of the Act, 15 U.S.C., sec. 3, says, in part: " * * * Every person who shall make any such contract or engage in any such combination or conspiracy [in restraint of trade or commerce] shall be deemed guilty of a misdemeanor * * *"[1]. Section 8 of the

1 See also 15 U.S.C., sec. 1, which likewise contains the "every person" language.

Sherman Act, 15 U.S.C., section 7, defines "person" to include "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any state * * *."

The general Rules of Construction for Federal statutes, 1 U.S.C., section 1, provide that, unless the context indicates otherwise,

> * * * the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as individuals; * * *

In the face of this express direction of Congress as to how statutes enacted by it are to be construed, we think there is no justification for reading partnerships out of the coverage of the Sherman Act. There is nothing in the context in which the word "person" is found in the Sherman Act which "indicates otherwise". See *United States v. A & P Trucking Co.*, 358 U.S. 121 (1958). There is nothing in the purpose for which the Sherman Act was enacted, which "indicates otherwise". If it had ever, during the almost eighty years since the Sherman Act was enacted, appeared to legal counsellors of business enterprises that the restrictions of the Sherman Act could or might be escaped by forming partnerships rather than corporations or "associations", whatever that latter word may have been intended to include, it would seem that the experiment would have been tried, and that if it had been tried litigation would have resulted. But the question has been raised in only one reported case. *United States v. Brookman Co.*, 229 F.Supp. 862 (N.D.Cal. 1964). In that case the Court held that the Sherman Act's definition, in section 8 of the Act of the word "person", used in section 1 of the Act, as including "corporations and associations", placed partnerships within the scope of the Act.

Not until the defendants made their motion for reconsideration, after the District Court had denied their "motion to eliminate and reduce sentences", did the defendants present the argument that partnerships are not within the coverage of the Sherman Act. We think that the defendants' earlier appraisal, whether made consciously or only subconsciously, of the merits of such an argument, was correct. We think that the argument has no merit, and we will not discuss the writings in which judges and scholars have debated the question whether a partnership is an "entity" or an "aggregate." See, e.g., Mr. Justice Douglas' dissenting opinion in *United States v. A & P Trucking Co., supra*, at p. 127.

We consider now the issue which is designated as Issue No. 1 in the defendants' brief. Their statement of it is as follows:

> Does the U. S. Constitutional proscription against double jeopardy and double punishment require that the sentence against Defendant Hazan be eliminated? Does said proscription require that the punishment against said defendant be eliminated?

The appellants' argument on this issue is that the defendant Hazan was indicted twice for the same conspiracy, for the same single offense; that the indictment named Western, the partnership in which Hazan was a partner, and also named Hazan, the individual, thereby twice indicting Hazan for the same offense, since the indictment of Western was, for the purposes of trial and punishment, the indictment of Hazan, together with his partners in Western, as individuals.

The defendant would not make this argument if Western had been a corporation, in which Hazan was a stockholder. In that case the corporation would have been a distinct legal entity, in the assets of which no person other than the corporation had

an ownership interest. If the indictment resulted in a conviction of the corporation, and a fine levied against it, the Government would collect its fine out of the corporation's assets, if it collected it at all. If an officer or stockholder of that corporation had been indicted, in the same indictment with the corporation, as a conspirator in the violation of the Sherman Act, and had been convicted and sentenced, the Government would have had to collect its fine from the stockholder's or officer's individual assets, if it collected it at all. And of course, if the sentence had been a prison term, the stockholder would be the one to serve that term. If the stockholder had a large stockholder's interest in the corporation, the outcome of the proceeding against the corporation would be of vital concern to him, because of its effect upon the value of his stock. But no problem of double jeopardy would be involved.

In the case of the indictment of a partnership and a partner, in a Sherman Act situation, there is not the same clear distinction, between the interest of the partner *qua partner*, i.e., his interest in the partnership, and his individual interest, that exists in the corporation-stockholder situation. The difference may make a more careful analysis useful.

If the applicable law is that, in the instant case, Hazan, having paid his $1.000.00 fine, may be obligated to pay Western's $25,000.00 debt to the United States, if that debt can not be collected, or cannot be collected in full from Western, a problem of double jeopardy is presented. In *Green v. United States*, 355 U.S. 184, 198 (1957) the court said:

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are

> given a narrow grudging application they are deprived of much of their significance.

See also *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873); *Johnson v. Rhay*, 266 F.2d 530, 533 (CA 9, 1959), *United States v. Armco Steel Corp.*, 252 F.Supp. 364, 367, (D.C.S.D. of Cal. 1967).

If the constitutional proscription of double-jeopardy is otherwise violated we think that the fact that one of the punishments is contingent upon some other event such as, in our instant case, the failure of Western to pay the fine levied against it, does not eliminate the vice of double jeopardy.

In the foregoing discussion we have assumed the law to be that, because Hazan was a partner in Western, the imposition of the fine upon Western had the effect of imposing, contingently, the same fine upon Hazan. The Supreme Court of the United States in *United States v. A & P Trucking Co.*, 358 U.S. 121 (1958), had before it the question whether a partnership could be indicted for violating certain statutes[2] regulating safety and certification requirements for motor carriers. The Court, in responding to the argument that the indictment of a partnership might put a partner in jeopardy though he did not knowingly participate in the criminal act, said at pp. 126, 127:

> We hold, therefore, that a partnership can violate each of the statutes here in question quite apart from the participation and knowledge of the partners as individuals. The corollary is, of course, that the conviction of a partnership cannot be used to punish the individual partners, who might be completely free of personal guilt. As in the case of corporations, the conviction of the entity can lead only to a fine levied on the firm's assets.

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2 49 U.S.C., sec. 322(a) and 18 U.S.C., sec. 835.

In view of this authoritative statement by the Supreme Court in the A & P Trucking Co. case, in which the issue was closely comparable to our instant issue, we cannot say that Hazan has been put in double jeopardy by the judgment from which the defendants have appealed. The Supreme Court treated the partnership in A & P Trucking as an entity, analogous to a corporation. As we have said, we will not discuss the much debated issue of whether the "entity" theory of partnership or the "aggregate" theory is the correct one. The Supreme Court has, for the purpose at hand, adopted the entity theory. When the ultimate authority has spoken, there is no room for further debate.

The decision of the District Court is affirmed in its entirety.

HUFSTEDLER, Specially Concurring:

I concur in that portion of the majority opinion holding that a partnership is subject to indictment for violating the Sherman Act. I cannot concur in the remainder of the opinion, for I seriously question that *United States v. A & P Trucking Co.* (1958) 358 U.S. 121 can bear the burden the majority places on it. The Court there held simply that a partnership could violate certain regulatory statutes even if the individual partners did not participate in or have knowledge of the violations. The Court then added as dictum the sentence relied upon by the majority: In such an instance the fine levied on the partnership should not be collected from the partners' individual assets. The setting in A & P was thus very different from the setting in our case. I doubt that the Court's dictum can be expanded to a case in which a partner is not "completely free of personal guilt." In addition, A & P dealt with a specific

intent crime (*United States v. Chicago Express Inc.* (7th Cir. 1956) 235 F.2d 785), and hence its limitation of liability is not necessarily transportable to a Sherman Act offense.[1]

But even if A & P Trucking can be read as broadly as the majority suggests, I question its relevance. Hazan's argument is not that he *might* be placed in double jeopardy *should* the partnership assets prove insufficient to meet the partnership fine—the problem referred to in A & P Trucking. He is arguing that double jeopardy results from simultaneously levying upon (a) his personal assets for the personal fine and (b) those assets in the partnership that are legally his property for the partnership fine. Although the Supreme Court adopted the entity theory for the one particular problem presented in A & P Trucking, it does not follow that that theory is applicable to Hazan's different claim.

I see no reason to stretch A & P to reach Hazan's constitutional claim, because I believe he waived that claim below. The double jeopardy issue was raised for the first time almost two months after appellants were convicted upon their plea of nolo contendere on a motion to correct sentence. A plea of guilty to a two-count indictment waives a later double jeopardy argument that the two counts were in fact for the same offense (*Harris v. United States* (8th Cir. 1956) 237 F.2d 274), and, of course, a nolo plea is the equivalent of a guilty plea for waiver purposes. Hence, I would hold that Hazan's nolo plea waives his claim that he was indicted and punished in two capacities for the same offense. (*See also Haddad v. United States* (9th Cir.) 349 F.2d 511, *cert. denied* (1965) 382 U.S. 896; *Berg v. United States* (9th Cir.) 176 F.2d 122, 125, *cert. denied* (1949) 338 U.S. 876; *Caballero v. Hudspeth* (10th Cir. 1940) 114 F.2d 545.) Moreover, double jeopardy is a personal

1 Specific intent is not required for a Sherman Act conviction. *See, e.g., Arthur Murray, Inc. v. Reserve Plan, Inc.* (8th Cir. 1969) 406 F.2d 1138.

defense, and Western cannot raise it on Hazan's behalf.

ELY, Circuit Judge (Concurring):

I concur in Judge Madden's principal opinion, and I also agree with Judge Hufstedler's views concerning Hazan's waiver of any right on his part to urge, in our court, that he has been doubly jeopardized.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on MAY 27, 1970, I served the within PETITION FOR WRIT OF CERTIORARI (WESTERN LAUNDRY AND LINEN RENTAL CO. and MORRIS A. HAZAN v. UNITED STATES OF AMERICA) on the following named parties by depositing two copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the UNITED STATES POST OFFICE IN THE CITY OF HUNTINGTON BEACH, CALIFORNIA, addressed to said parties at the addresses as follows:

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WASHINGTON, D. C.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
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SAN FRANCISCO, CALIFORNIA 94101

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MAY 27, 1970, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

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SUPREME COURT U. S.

No. 314

In the Supreme Court of the United States

OCTOBER TERM, 1940

WESTERN LAUNDRY AND LINEN RENTAL CO. AND MORRIS A. HAGAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION